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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961
No. 540

WEST CHAPTER, FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, AFL-CIO, *Petitioner,*

vs.

NATIONAL MEDIATION BOARD; LEVERETT EDWARDS, Individually and as Chairman of the National Mediation Board; FRANCIS A. O'NEILL, JR., Individually and as Member of the National Mediation Board; ROBERT O. BOYD, Individually and as Member of the National Mediation Board; WESTERN AIR LINES, INC., Intervenor; SECOND OFFICERS' ASSOCIATION, Intervenor,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

BRIEF FOR RESPONDENT WESTERN AIR LINES, INC. IN OPPOSITION.

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NATIONAL MEDIATION BOARD; LEVERETT EDWARDS, Individually and as Chairman of the National Mediation Board; FRANCIS A. O'NEILL, JR., Individually and as Member of the National Mediation Board; ROBERT O. BOYD, Individually and as Member of the National Mediation Board; WESTERN AIR LINES, INC., Intervenor; SECOND OFFICERS' ASSOCIATION, Intervenor,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

BRIEF FOR RESPONDENT WESTERN AIR LINES, INC. IN OPPOSITION.

Opinions Below.

There was no written opinion in the District Court. The findings of fact and conclusions of law of the District Court on petitioner's motion for preliminary injunction and the District Court's order denying the mo-

tion are printed in Appendices I and II to this Brief. The order of the District Court, appealed by petitioner, granting respondents' motion for summary judgment, denying petitioner's motion for summary judgment and dismissing the complaint is printed in Appendix A to the Petition.

Petitioner seeks a writ of certiorari in this case before judgment in the Court of Appeals.[1]

Jurisdiction.

The decision of the District Court was entered on October 18, 1961. Petitioner's appeal was docketed by the filing of the original record in the Court of Appeals on October 25, 1961.

The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

Questions Presented.

1. Whether representation proceedings under Section 2, Ninth of the Railway Labor Act, 45 U. S. C. §152, Ninth are reviewable because the National Mediation Board denied voting rights to discharged employees claiming eligibility under a rule of the Board.

2. Whether representation proceedings under Section 2, Ninth of the Railway Labor Act, 45 U. S. C. §152, Ninth are reviewable because the National Mediation

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[1]Western's objections to transmittal of the record to this court before judgment in the Court of Appeals were that normal appellate processes should be followed, that no "imperative" public interest would be served by deviating therefrom and that the pendency in this Court of a petition for writ of certiorari in *UNA Chapter, Flight Engineers' International Association, AFL-CIO v. National Mediation Board, et al.*, No. 531, October Term, 1961, did not justify such deviation. *Cf.* Petition, p. 2.

Board, although it was not required to do so under the Act or the Board's regulations, called a hearing on a rival union's charge that the applicant union had been illegally assisted by the carrier and, in connection therewith, refused to require the applicant union and the carrier to produce certain allegedly essential witnesses.

Statute and Administrative Rules Involved.

The statute involved is the Railway Labor Act, 44 Stat. 577, 48 Stat. 1186, 49 Stat. 1189, 45 U. S. C. §§151, *et seq.* The pertinent statutory provision is Section 2, Ninth of the Act, 48 Stat. 1188, 45 U. S. C. §152, Ninth:

> "If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives

Rules of National Mediation Board, Rule 6, 29 C. F. R. § 1206.6:

"*Eligibility of dismissed employees to vote.* Dismissed employees whose requests for reinstatement account of wrongful dismissal are pending before proper authorities, which includes the National Railroad Adjustment Board or other appropriate adjustment board, are eligible to participate in elections among the craft or class of employees in which they are employed at time of dismissal. This does not include dismissed employees whose guilt has been determined, and who are seeking reinstatement on a leniency basis."

in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph."

Appendix III to this Brief sets out other relevant provisions of the Act and the Board rules involved.

Statement.

A. The Walkout.

On February 17, 1961, the flight engineers in the employ of respondent Western Air Lines, Inc. ("Western"), represented by petitioner, without notice or warning in concert refused to accept work assignments. Western's operations were brought to a standstill, stranding thousands of air travellers on its system. Simultaneous flight engineer walkouts occurred across the nation on American Airlines, Eastern Air Lines, The Flying Tiger Line, National Airlines, Pan American World Airways and Trans World Airlines.

The walkout was not the result of any jurisdictional or other labor dispute with or involving Western, or any of the other carriers.

On February 18, 1961, the United States District Court for the Southern District of California issued a temporary restraining order enjoining the walkout and strike against Western.[2] The restraining order was served the same day and each of petitioner's members was notified. The order was ignored.

Western attempted to continue to operate. Each flight engineer was personally requested to return to work. On refusal, employment was terminated and the employee was so notified.[3]

On February 20, 1961, Western dismissed the action in which the temporary restraining order had issued and commenced the hiring and training of replacement flight engineers.

On February 21, 1961, Secretary of Labor Arthur J. Goldberg issued a press release stating that he had investigated the flight engineer walkouts on American Airlines, Eastern Air Lines, The Flying Tiger Line, National Airlines, Pan American World Airways and Trans World Airlines, that he had conferred with representatives of those carriers and with representatives of the unions involved and that he had obtained the "assurance" of the carriers that no disciplinary action would be taken against the strikers if they returned to work.

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[2]*Western Air Lines, Inc. v. Flight Engineers International Association, et al.*, U. S. D. C., S. D. Cal., Civil Action No. 178-61-HW.

[3]Most of the terminations occurred in the first four days of the walkout. Flight engineers on vacation, sick leave or other authorized absences were terminated at the time they were scheduled to return to work and refused to do so upon individual request.

On the same date Executive Order 10921, 26 F. R. 1553, was issued, establishing an advisory commission to inquire into the controversy as it affected the carriers named in the Secretary of Labor's press release and to report to the President.

On February 23, 1961, Executive Order 10922, 26 F. R. 1655, was issued amending Executive Order 10921 to include Western among the named air carriers, without Western's consent and without any commitment or assurance on its part to reconsider the discharges.

B. The Election.

On April 6, 1961, the Second Officers' Association ("SOA"), a labor organization composed of flight engineers employed by Western, commenced the Board proceedings giving rise to this case, by the filing of an application for certification under Section 2, Ninth as the authorized representative of Western's flight engineers.

Petitioner filed allegations that SOA had been illegally assisted by Western in violation of the Act. On May 26, 1961, a public hearing was held on the charge in Los Angeles, California, before respondent Robert O. Boyd, Member of the Board. In advance of the hearing petitioner had requested the Board to require Western and SOA to produce certain witnesses and alleged documents at the hearing. The Board had advised petitioner that it had no powers of subpoena or compulsory process.

Testimony and documentary evidence were adduced at the hearing. The Secretary and the Treasurer of SOA voluntarily appeared and were examined by petitioner's counsel. A representative of Western was present as requested by the Board. SOA's minutes and records were produced for the Board's inspection alone, which procedure was agreed to by petitioner's counsel. Western's representative invited the Board to inspect Western's records.

On June 21, 1961, the Board issued Findings Upon Investigation (Appendix C to the Petition) concluding that the charge of illegal assistance had not been substantiated and directing that investigation of the representation dispute proceed.

Petitioner then urged that if an election were held Board Rule 6, 29 CFR §1200.6, required that the discharge flight engineers be permitted to vote. The contention was predicated on a "group grievance" for reinstatement filed with Western on June 23, 1961, and rejected by Western on June 26, 1961, the alleged pendency of the grievance before the System Board of Adjustment (although Western's rejection of the grievance had not been appealed to the System Board), two counterclaims filed on July 5, 1961, against Western in the United States District Court for the Southern District of California and the pendency of the Presidential investigation.[4]

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[4]See footnote 8, *infra*, as to these allegations.

On July 19, 1961, the Board advised petitioner that the election would be conducted among the flight engineers then employed by Western.

Ballots were mailed with a return date of August 7, 1961. After deferral because of proceedings in this case, the ballots were counted on September 1, 1961.[5]

On September 5, 1961, the Board certified SOA as the duly designated and authorized representative of the flight engineers employed by Western.

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[5]Of the 104 employees on the eligibility list, 93 returned ballots—88 voted for SOA, 1 voted for petitioner and 2 voted for other representatives; two ballots were voided. While the number of discharged flight engineers was 123, petitioner has made no showing that all would have been eligible to vote under other applicable rules of the Board, *e.g.*, the rule that furloughed employees working for another carrier subject to the Railway Labor Act are not eligible to participate in an election among employees of the carrier from which they were furloughed. The affidavit of S. R. Shatto, Vice President-Operations of Western, referred to in the Petition, pp. 7-8, attested to the number discharged, not to the number that might have been eligible to vote.

ARGUMENT.

I.

There Is No Justification for Consideration of This Case Before Judgment in the Court of Appeals.

Petitioner offers no argument or showing that this case is "of such imperative public importance as to justify . . . deviation from normal appellate processes and to require immediate settlement" in this Court before judgment in the Court of Appeals. Rule 20, 28 U. S. C. A.

Petitioner's ground for skipping the Court of Appeals is that this case—see Petition, pages 8, 13—"amplifies," "illuminates" and "clarifies" the issues in *UNA Chapter, Flight Engineers' International Association v. National Mediation Board*, No. 531, October Term, 1961, in which application for certiorari is pending after judgment in the Court of Appeals.

It is neither contended nor shown that identical or closely related issues are posed in the two cases. The cases have no affinity other than the fact that the same statute is involved and in each case the District Court held that the issues presented were not justiciable. Normal appellate processes should be followed in this case.

II.

The Decision of the District Court Is Not in Conflict With Applicable Decisions of This Court.

This is a clear case for application of *Switchmen's Union v. National Mediation Board*, 320 U. S. 297. Constitutional issues aside, actions of the National Me-

diation Board under Section 2, Ninth of the Railway Labor Act are not reviewable. The District Court's decision that *Switchmen's Union* governs this case is correct.

Petitioner contends that the District Court's decision "flatly" contradicts *Leedom v. Kyne*, 358 U. S. 184, and *Accardi v. Shaughnessy*, 347 U. S. 260.

The "sole and *narrow* question" in *Leedom* was "whether a Federal District Court has jurisdiction of an original suit to vacate . . . [a] determination of the [National Labor Relations] Board because made *in excess of its powers.*" 358 U. S., at 185.[6] "This suit is not one to 'review,' . . . a decision of the Board made within its jurisdiction. Rather it is one to strike down an order of the Board made *in excess of its delegated powers and contrary to a specific prohibition in the Act.*" *Id.*, at 188. Petitioner's contentions rest on a rule of the Board, not a statutory prohibition in the Act. *Leedom* is not in point.

Accardi, on the other hand, holds that self-imposed *procedural* regulations must be scrupulously observed in hearings held by government administrators and agencies, even when the administrative action in question is discretionary in nature. The *Accardi* rule is confirmed in *Service v. Dulles*, 354 U. S. 363, and *Vitarelli v. Seaton*, 359 U. S. 535. "He that takes the procedural sword shall perish by that sword." 359 U. S., at 547. There was no departure from that principle here.

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[6]Emphasis in quoted material added throughout unless otherwise noted.

Petitioner relies on Rule 6 of the Board, 29 CFR §1206.6, which reads:

> "Dismissed employees whose requests for reinstatement account of wrongful dismissal are pending before proper authorities, which includes the National Railroad Adjustment Board or other appropriate adjustment board, are eligible to participate in elections among the craft or class of employees in which they are employed at time of dismissal. This does not include dismissed employees whose guilt has been determined, and who are seeking reinstatement on a leniency basis."

Rule 6 does not regulate *procedures* of the Board in *hearings* held by it. The Rule states a discretionary policy regarding voting rights in elections. Its meaning and application are for the Board to determine.[7] *Switchmen's Union v. National Mediation Board*, 320 U. S. 297, 305.

The statute involved in *Securities and Exchange Commission v. Chenery Corp.*, 318 U. S. 80, provides for judicial review of the Commission's orders. The question there decided was whether a Commission order based on "broad equitable principles" established by judicial decision could be supported by determinations which the Commission might have made within its special competence. It was held that the order had to be judged on the professed grounds, not by what the Commission might have done. That case has no bearing here.

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[7]Rule 7 of the Board, 29 CFR § 1206.7, reads:

"These Rules and Regulations shall be liberally construed to effectuate the purposes and provisions of the Act."

The Board's refusal to apply Rule 6 in this case was within its discretionary jurisdiction.[8]

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[8]This is underscored by the fact that at the time the Board made its determination not to allow the discharged employees a vote it had at hand, among other information (all of which is of record herein):

1. The finding of the United States District Court for the Southern District of California that the discharged employees had "simply quit their jobs" (Appendix I, *infra*, Finding 12).

2. A transcript of court proceedings between petitioner and Western subsequent to the strike, in the course of which counsel for petitioner stated:

> "I don't see any basis for them [the discharged employees] to say, we can refuse to take an assigned job, but you can't fire us over it . . . these men misconducted themselves and can't get their jobs back, in my opinion."

3. The May 24, 1961, report submitted to the President by the commission established by Executive Order 10921, in which it disclaimed any power to pass on the legal propriety of the Western discharges.

4. A decision of the Director of the Civil Aeronautics Board's Bureau of Enforcement in CAB Docket 12223 refusing to institute enforcement proceedings against Western on petitioner's complaint that Western had violated the Federal Aviation Act, 49 U. S. C. §§ 1301, *et seq.*, by refusing to reinstate the discharged employees.

5. The counterclaims filed by petitioner in *Western Air Lines, Inc. v. Flight Engineers International Association, AFL-CIO, et al.*, U. S. D. C., S. D. Cal., Civil Action No. 510-61-PH, praying that an injunction be issued requiring Western to reinstate the discharged employees on the ground that Western had violated the Railway Labor Act by conspiring with the Air Line Pilots Association, International, to substitute that union for petitioner as the representative of Western's flight engineers and by refusing to entertain the pretexted group grievance.

6. The full details of the alleged grievance showing that the discharged employees had no requests for reinstatement pending before "proper authorities" within the meaning of the Act and Rule 6. The Act in Section 3, First (i), 45 U. S. C. § 153, First (i) and Title II, Section 204, 45 U. S. C. § 184, prescribes the proper authorities for the handling of grievances, namely, operating officers of the carrier up to and including the chief operating officer designated to handle such disputes (as in the Board cases cited in the Petition, p. 10n) and the National Railroad Adjustment Board or appropriate System Board of

III.

No Substantial Due Process Issue Is Presented.

Proceedings under Section 2, Ninth involve "mediation, *not adjudication*—mediation being 'the antithesis of justiciability.' 320 U. S., at 337." *Union Pacific R. Co. v. Price*, 360 U. S. 601, 619n. ". . . [T]here is no requirement as to hearings. And there is no express grant of subpoena power. The Mediation Board makes no 'order.' And its only ultimate finding of fact is the certificate." *Switchmen's Union v. National Mediation Board*, 320 U. S. 297, 304. "The function of the Board under § 2, Ninth is more the function of a referee." *Id*, at 304. ". . . Congress did not give the Board discretion to take or withhold action, to grant or deny relief. It gave it no enforcement functions. It was to find the fact and then cease." *Id.*, at 305.

The Board has no rules or regulations governing the procedures to be followed in hearings that it may call. *Cf. Accardi v. Shaughnessy*, 347 U. S. 260. Such hearings as the Board may hold are advisory in nature and are not binding on the Board in reaching its ultimate determination under Section 2, Ninth.

Petitioner was afforded full opportunity to present whatever evidence it had to support its allegations that SOA had been illegally assisted. *Cf. Order of Railway*

Adjustment. *Railroad Trainmen v. Chicago River & I. R.R. Co.*, 353 U. S. 30. The grievance on its face was untimely and without right under the collective bargaining agreement, and its rejection by Western had not been appealed to, and was not pending before, the System Board of Adjustment. See *Atlantic Coast Line R. Co. v. Pope*, 119 F. 2d 39 (4 Cir.); *Peoples v. Southern Pacific Co.*, 232 F. 2d 707 (9 Cir.); *Crusen v. United Air Lines*, 239 F. 2d 803 (10 Cir.); *Hooser v. Baltimore & Ohio R. Co.*, 279 F. 2d 197 (7 Cir.).

Conductors v. Pennsylvania R. Co., 323 U. S. 166. Due process requires no more.

Moreover, Section 2, Ninth contains no command that the Board determine, much less adjudicate, compliance or lack of compliance with Sections 2, Third and Fourth. The prohibitions of Sections 2, Third and Fourth, pertinent to petitioner's accusation, are on the carrier. The carrier is not a party to proceedings under Section 2, Ninth. The Act in Section 2, Tenth, 45 U. S. C. §152, Tenth, prescribes criminal penalties for violations of Sections 2, Third and Fourth by a carrier.[9] ". . . Congress intended to go no further in its use of the processes of adjudication and litigation than the *express provisions* of the Act indicate." *Switchmen's Union v. National Mediation Board*, 320 U. S. 297, 302.

The Board's determination is nonetheless final by reason of petitioner's claim of violation of Sections 2, Third and Fourth. Section 2, Ninth permits of no distinction which would subject to judicial review this particular aspect of the problem, assuming the Board is required to consider it at all.

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[9]Petitioner has filed a complaint with the United States Attorney, Los Angeles, California, alleging that Western unlawfully assisted SOA in violation of Section 2, Fourth and requesting investigation and institution of criminal proceedings under Section 2, Tenth.

Conclusion.

The petition for a writ of certiorari in this case should be denied.

December 6, 1961.

Respectfully submitted,

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APPENDIX I.

Findings of Fact and Conclusions of Law.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Wes Chapter, Flight Engineers' International Association—AFL-CIO, 4013 Don Tomaso Drive, Los Angeles, California, Plaintiff, v. National Mediation Board, Leverett Edwards, Individually and as Chairman of the National Mediation Board, Francis A. O'Neill, Jr., Individually and as Member of the National Mediation Board, Robert O. Boyd, Individually and as Member of the National Mediation Board, 1230 Sixteenth St., N. W. Washington 6, D. C., Defendants. Civil Action No. 2509-61.

This cause came on for hearing in open Court on plaintiff's Motion For Preliminary Injunction and defendants' Opposition thereto. Upon consideration of the said Motion and Opposition and of the complaint, affidavits and exhibits of record, and the parties having filed memoranda of points and authorities in support of and in opposition to the said motion, and after hearing oral argument, the Court on this 25th day of August, 1961, makes the following findings of fact and conclusions of law:

Findings of Fact

1. On April 6, 1961, the National Mediation Board received a telegraphic application from the Second Officers Association for the Board's services under Section 2, Ninth of the Railway Labor Act (45 U. S. C. §152) for investigation of a representation dispute alleged to exist among the employees of Western Air Lines, Inc., employed as Flight Engineers. At that

time the Flight Engineers' International Association held a certification to represent these employees under National Mediation Board Case No. R-3209 certification dated October 22, 1957.

2. When notified by the Board of the receipt of this application, the Flight Engineers' International Association (hereinafter referred to as FEIA) in a letter dated April 17, 1961, made various allegations, including the following:

> "(1) Wes Chapter F.E.I.A. avers, upon information and belief, that the said 'Second Officers Association' is an organization illegally assisted by the carrier in violation of the provisions of the Railway Labor Act. We respectfully request that the Board conduct an investigation into the carrier's assistance, and hold a public hearing as part of such investigation.
>
> "(2) Wes Chapter F.E.I.A. avers, upon information and belief, that the authorizations relied on by the said 'Second Officers Association' were solicited with the assistance of the carrier in violation of the Act."

3. The application of the Second Officers Association was considered by the Board in executive session on April 20, 1961, and the Board directed that it be docketed for investigation as NMB Case No. R-3483. Western Air Lines, Inc., the Second Officers Association, and the attorney for the FEIA were so notified in a letter of the Board dated April 21, 1961.

4. On May 1, 1961, the attorney for the FEIA was notified by letter, copies of which were sent to Western Air Lines, Inc., and the Second Officers Association, that after consideration of the FEIA letter

of April 17, 1961, the Board would hold a hearing on item 1 in that letter (quoted above in paragraph 2). A Notice of Hearing dated May 17, 1961, set the date of the hearing for May 26, 1961, in Los Angeles, California.

5. On May 17, 1961, the FEIA wrote the Board requesting the latter to arrange for the presentation of documents, information and the presence of certain individuals at the hearing to be conducted on May 26, 1961. Replying by letter dated May 22, 1961, the Board outlined its policy in respect to hearings in representation proceedings under Section 2, Ninth of the Railway Labor Act. As stated in the letter, the Board has no power to issue subpoenas or to compel the attendance of witnesses or submission of evidence. It is the obligation of the party requesting such a hearing to produce evidence to substantiate its allegations.

6. Following the hearing, the Board on June 21, 1961, issued its Findings Upon Investigation in which it found that no fact was established at the hearing from which even an inference, let alone a conclusion, could be drawn supporting either of the charges made by FEIA, as quoted in paragraph 2 above. The Board, therefore, directed that the investigation of the dispute alleged in the application of the Second Officers Association be progressed to a conclusion under the rules and practices of the Board.

7. The Board set the case for handling by Mediator Luther G. Wyatt to commence in Los Angeles, California, on June 23, 1961, and all parties at interest were advised accordingly. At the request of the FEIA, the Board postponed that portion of the handling of

the case requiring the presence of party representatives from June 23, 1961 to July 5, 1961.

8. On June 22, 1961, the Board telegraphed the officers and attorney of the FEIA advising that the Mediator's initial investigation would proceed as scheduled, and any questions on eligibility or other issues could be presented to the Mediator when such investigation had been completed. The initial investigation, which consists of securing lists of employees from the carrier and checking authorization cards against such list, does not require the presence of representatives of the parties. The Mediator completed his initial investigation and so reported to the Board on June 29, 1961. On June 30, 1961 the Board telegraphed the parties to this dispute that the Mediator's initial investigation had been completed, setting the date of July 5, 1961 for the Mediator to meet the parties and set up an eligible list.

9. At the meeting held by Mediator Wyatt to consider establishing an eligible list, the FEIA was represented by two attorneys, an economist and a member of the FEIA, who verbally raised a number of objections to holding an election. The Mediator reported this situation to the Board, and a telegram was dispatched to the FEIA representatives requesting them to put their objections in writing for the Board's consideration. While the Board's mediators conduct the investigation of representation disputes, under the Board's customary practices, questions at issue between the parties concerning eligibility of employees, preponderance of service, and certain other matters not here directly involved, must be decided by the Board, not the mediator.

10. On July 5, 1961, the Board received a letter from attorneys of the FEIA commenting on the meeting held by Mediator Wyatt at Los Angeles, California, on that date. The objections of the FEIA to holding an election in this case were received by the Board on July 10, 1961, in the form of a letter from an FEIA attorney dated July 8, 1961. Letters dated July 10, 1961 and July 13, 1961, respectively, from an attorney for the Second Officers Association relative to the matters set forth in the said letter of the FEIA attorney, dated July 8, 1961, were also received by the Board.

11. On July 17, 1961, the Board received a copy of a letter from the Civil Aeronautics Board to Mr. Ronald A. Brown, President of the FEIA, dated July 7, 1961, regarding a "*Complaint of Flight Engineers' International Association v. Western Air Lines, Inc.*, alleging violations of the Railway Labor Act and the Federal Aviation Act, CAB dock 12223." In rejecting the FEIA allegations, the letter noted the various matters which were considered in that proceeding, including all matters of record in the cases of *Western Air Lines, Inc. v. Flight Engineers' International Association*, Civil Action No. 178-61 HW (USDC, S.D. Cal.), *Flight Engineers' International Association v. Western Air Lines, Inc.*, Civil Action No. 362-61-PH (USDC, S.D. Cal.), and *Western Air Lines, Inc. v. Flight Engineers' International Association*, Civil Action No. 510-61-PH (USDC, S.D. Cal.) and the inapplicability of Executive Order 10922 to the FEIA position.

12. During the course of the Board's proceedings, the Board was aware of a decision issued on April 14,

1961 by District Judge Hall of the United States District Court for the Southern District of California in *Flight Engineers' International Association v. Western Air Lines, Inc.*, Civil Action No. 302-61 PH, reported by the Bureau of National Affairs at 48 LRRM 2487, stating in part:

> "On February 17, 1961 the flight engineers who were employed by Western Air Lines failed to show up for work. The Union says there was no Union sponsored strike. If there was no strike, the court is compelled to the conclusion that the flight engineers individually each of them simply quit their jobs.
>
> "In this connection the following fact is important: On February 18, 1961 the Company requested each flight engineer individually to return to work, and each refused, although in the meantime a lawful injunction had been secured enjoining the strike, and the Company thereupon terminated all of the flight engineers who had refused to show up for work on the payroll."

13. The National Mediation Board met on July 18, 1961, and gave due consideration of all the information before it, including the points raised by the attorneys for the FEIA and the Second Officers Association, the decision of the Civil Aeronautics Board noted above in paragraph 11, the decision of Judge Hall noted above in paragraph 12, and the application of the Board's own Rules and Regulations governing the handling of representation disputes to the various contentions of the parties regarding the eligibility of present and former employees of Western Air Lines, Inc., employed as Flight Engineers. In this connec-

tion, the Board gave particular consideration to the FEIA contention that the former Flight Engineers of Western Air Lines, Inc., are eligible to participate in the election under Rule 6 of the Board's Rules and Regulations which reads as follows:

> "6. *Eligibility of dismissed employees to vote.*
>
> "Dismissed employees whose requests for reinstatement account of wrongful dismissal are pending before proper authorities, which includes the National Railroad Adjustment Board or other appropriate adjustment board, are eligible to participate in elections among the craft or class of employees in which they are employed at time of dismissal. This does not include dismissed employees whose guilt has been determined, and who are seeking reinstatement on a leniency basis."

Upon consideration of all of the foregoing matters, the Board decided that the former flight engineers were not eligible under this rule and reached the decision set forth in the Board's telegram of July 19, 1961, to an FEIA attorney which states:

> "The National Mediation Board has fully considered all of the objections presented or asserted by you in connection with NMB Case No. R-3483 and finds they are without merit under the Board's rules and that no sufficient cause has been presented under such rules for additional delay of the election in this case. All of said objections and requests based thereon are accordingly overruled. The Board is also of the opinion that no further hearing or argument is necessary or justified under the showing made and request for same is denied. On basis of Mediator's report of his check of

authorizations, the Board has found that a representation dispute exists among flight engineers currently employed by Western Air Lines, Inc., and directs that a mail ballot election be conducted among these employees forthwith, using eligible list prepared by the Mediator. By order of the National Mediation Board."

Mediator Wyatt was instructed by the Board in a telegram of July 20, 1961 to proceed with a mail ballot forthwith in accordance with the Board's decision.

14. On July 25, 1961, the attorneys for the FEIA telegraphed the Board that Western Air Lines, Inc., had excluded from the eligible list given the Mediator the employees performing flight engineer functions on Boeing jet aircraft. In a telegraphic reply to an FEIA attorney on the same date, the Board advised that the Mediator had been instructed to immediately secure from Western Air Lines, Inc., the names and addresses of those employees for consideration of their status as eligibles by the Board. This was done by the Mediator, and the names of 13 "Second Officers" who had worked a preponderance of their time during the period of May 15, to June 15, 1961, inclusive, performing flight engineer functions on Boeing jet aircraft were added to the eligible list by agreement between representatives of the FEIA and the Second Officers Association.

15. Ballots for all employees of Western Air Lines, Inc., working as Flight Engineers, as shown on the eligible list prepared by the Mediator were placed in the United States mail on July 24, 1961, and the ballots for the 13 additional employees referred to in paragraph 14 above were placed in the mail on July 26,

1961. The count of the returned ballots scheduled to be made on August 7, 1961, was deferred after the issuance by this Court of a temporary restraining order on August 4, 1961, which expired on August 17, 1961. The Board intends to issue a certification of the results of the election following the count of the ballots to be undertaken.

16. Plaintiff will not suffer any irreparable damage by a denial of the injunctive relief sought.

Conclusions of Law

In view of the foregoing, the Court concludes as a matter of law as follows:

1. That ultimate success by plaintiff in this cause is unlikely.

2. That plaintiff will not suffer irreparable damage by a denial of injunctive relief.

3. That plaintiff is not entitled to a preliminary injunction.

G. L. HART, JR.
Judge

APPENDIX II.

Order.

United States District Court
for the District of Columbia

Wes Chapter, Flight Engineers' International Association—AFL-CIO, 4013 Don Tomaso Drive, Los Angeles, California, Plaintiff, v. National Mediation Board, Leverett Edwards, Individually and as Chairman of the National Mediation Board, Francis A. O'Neill, Jr., Individually and as Member of the National Mediation Board, Robert O. Boyd, Individually and as Member of the National Mediation Board, 1230 Sixteenth St., N. W. Washington 6, D. C. Defendants. Civil Action No. 2509-61.

This cause came on for hearing in open Court on plaintiffs Motion For Preliminary Injunction and defendants' Opposition thereto. Upon consideration of the said Motion and Opposition and of the complaint, exhibits and affidavits of record, and the parties having filed memoranda of points and authorities in support of and in opposition to the said motion, and after hearing oral argument on behalf of the parties in open Court, and the Court having entered findings of fact and conclusions of law, it is by the Court on this 25th day of August, 1961,

Ordered that plaintiff's Motion For Preliminary Injunction be and the same hereby is denied.

G. L. HART, JR.
Judge

APPENDIX III.

Statutory and Administrative Provisions.

The provisions of the Railway Labor Act and the Rules and Regulations of the National Mediation Board which are involved (other than Section 2, Ninth of the Act which is quoted in the section of the Brief entitled "Statute and Administrative Rules Involved") include:

Section 2, First, 44 Stat. 577, 45 U.S.C. § 152, First:

> "It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

Section 2, Third, 48 Stat. 1187, 45 U.S.C. § 152, Third:

> "Representatives, for the purposes of this Act shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion

seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier."

Section 2, Fourth, 48 Stat. 1187, 45 U.S.C. § 152, Fourth:

"Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, . . ."

Section 2, Tenth, 48 Stat. 1189, as amended, 45 U.S.C. § 152, Tenth:

"The willful failure or refusal of any carrier, its officers or agents, to comply with the terms of the third, fourth, fifth, seventh or eighth paragraph of this section shall be a misdemeanor and upon conviction thereof the carrier, officer, or

agent offending shall be subject to a fine of not less than $1,000, nor more than $20,000, or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail to refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any United States attorney to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States: *Provided*, That nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent."

Title II, Section 204, 49 Stat. 1190, 45 U.S.C. § 184:

"The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions shall be hand-

led in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes.

"It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of this title, to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of section 3, Title I, of this Act.

"Such boards of adjustment may be established by agreement between employees and carriers either on any individual carrier, or system, or group of carriers by air and any class or classes of its or their employees: or pending the establishment of a permanent National Board of Adjustment as hereinafter provided. . . ."

Rule 6, Rules and Regulations of the National Mediation Board, 29 CFR § 1206.6:

"Dismissed employees whose requests for reinstatement account of wrongful dismissal are pending before proper authorities, which includes the National Railroad Adjustment Board or other appropriate adjustment board, are eligible to participate in elections among the craft or class of employees in which they are employed at time of dis-

missal. This does not include dismissed employees whose guilt has been determined, and who are seeking reinstatement on a leniency basis."

Rule 7, Rules and Regulations of the National Mediation Board, 29 CFR § 1206.7:

"These Rules and Regulations shall be liberally construed to effectuate the purposes and provisions of the Act."